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In the Supreme Court of the United States

OCTOBER TERM, 1928

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA, AT THE RELATION OF CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

U.S. GOVERNMENT PRINTING OFFICE: 1929

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. —

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA, AT THE RELATION OF city of Los Angeles, a Municipal Corporation, respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

The Interstate Commerce Commission, petitioner herein, prays that a writ of certiorari issue in accordance with the provisions of subsection (a) of section 240 of the Judicial Code, as amended and reenacted by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938), to review the judgment of the Court of Appeals of the District of Columbia, entered February 25, 1929. That judgment reversed a judgment of the Supreme Court of the District of Columbia which had dismissed a petition for writ of mandamus to compel this Commission to consider evidence in certain proceedings before it

for the purpose of determining whether it should issue an order requiring certain railroads to construct and use a union passenger station at a certain site in the City of Los Angeles.

STATEMENT OF THE CASE

The controversy had its inception in a proceeding instituted before the Railroad Commission of California by certain civic bodies of the City of Los Angeles against the Atchison, Topeka & Santa Fe Railway Company, the Southern Pacific Company, and Los Angeles & Salt Lake Railroad Company, hereinafter called the Southern Pacific, Santa Fe, and Salt Lake, respectively. In that proceeding the State Commission ordered those carriers to acquire sufficient land within what is known as the plaza area in said city for a union passenger station and terminal, to submit plans therefor, and upon their approval by that commission, to proceed with the construction of the station (R. 51, 52).

The carriers took this order by writs of review to the Supreme Court of California and that court in *A., T. & S. F. Ry.* v. *Railroad Comm. of Calif.*, 190 Cal. 214, held that the Transportation Act, 1920, had vested authority over the matter of union terminal depot facilities of interstate carriers in this Commission, thereby divesting the State Commission of the jurisdiction which it had sought to exercise. Upon petition of the State Commission, the Supreme Court of the United States granted writs of certiorari in respect of this decision.

Meanwhile the City of Los Angeles filed complaint with this Commission, asking in substance that said carriers be required to construct a union passenger station within the plaza area and to acquire the land necessary therefor, and that they be required and permitted to make such extensions and abandonments of lines and to arrange for such joint use of terminal tracks and facilities as might be necessary or incidental to the establishment of such union station.

On April 7, 1924, this court rendered its decision in the above-mentioned certiorari proceeding, *Railroad Comm. of Calif.* v. *Southern Pac. Co.*, 264 U. S. 331, wherein the court, in affirming the judgment of the State court, held in substance that the relocation of tracks, which were necessarily incidental to the proposed union passenger station, required a certificate of this Commission under paragraphs (18) to (21) of section 402, Transportation Act, 1920 (paragraphs (18) to (21) of section 1 I. C. C. Act as amended), as a condition precedent to the validity of any action by the carriers or of any order by the State Commission (346), and that until the Commission had acted under said paragraphs (18) to (21) the carriers could not be required to provide a new union station and to extend their main tracks thereto as ordered by the State Commission (348). The court had theretofore said (344) in respect of said paragraphs (18) to (21) that:

> * * * They provide that no interstate carrier shall undertake the extension of its

> line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation over such additional or extended line of railroad, unless and until the Commission shall certify that public convenience present or future requires it, and that no carrier shall abandon all or any portion of its line or the operation of it without a similar certificate of approval. Such a certificate is, we think, necessary in the construction of a new interstate union station which involves a substantial and expensive extension of the main tracks or lines of interstate carriers who theretofore have maintained separate terminals.

thereby showing that the action of this Commission which was a prerequisite to the building of the union passenger station was not a direct power to order the carriers to abandon existing terminals and to cooperate in the building of the new union station, but was an indirect means of control in respect of any such project, growing out of its power under said paragraphs (18) to (21) to grant or withhold authority for the incidental extensions and abandonments of lines, coupled with the injunction laid upon the Commission by paragraph (21) that it may authorize or order extensions of lines only where it finds that the expense involved will not impair the carriers' ability to perform their duties to the public.

After this court had rendered its said decision the proceeding instituted before petitioner by the

City of Los Angeles was heard. With it were consolidated an application by the Southern Pacific for authority to abandon certain main-line track and the operation of passenger and freight train service (except freight switching service) on Alameda Street and an application by the Southern Pacific and the Salt Lake for authority to construct new, and to extend existing, lines so as to permit the joint use by said railroads of the Southern Pacific's existing passenger station. This Commission, in its report, held that it was without authority to require the construction of the union station. In respect of this feature the report reads:

> We conclude that we are not empowered to require the construction of a union passenger station as sought in No. 14778. To make the record clear, we repeat that no question of discrimination or preference is presented here; and that under the issues framed in the complaint in No. 14778 we will give no consideration to matters shown of record for the purpose of determining whether we should issue an order *requiring* the construction and use of a union station by any of the defendants. (R. [redacted]78.)

However, in line with this court's interpretation of its authority the Commission made findings which may be summarized as follows: (1) That the public convenience and necessity require the extensions of lines that may be necessary to reach and serve any union passenger station within the plaza area constructed in accordance with a lawful order

of the State Commission and that may be necessary to provide for the incidental rearrangement of passenger and freight routes, and that the expense involved will not impair the carriers' ability to perform their duties to the public. (2) That public convenience and necessity permit the abandonment of train service on Alameda Street and such other abandonments of lines as would be necessary in connection with the establishment of any such station, so lawfully ordered by the State Commission. The report further found that such joint use of track or other terminal facilities as may be incidental and necessary to the proper operation of any such union station is in the public interest and is practicable, without substantially impairing the owning carriers' ability to handle their own business. As to the application by the Southern Pacific and Salt Lake to extend their lines to permit the joint use of the Southern Pacific's existing station, the Commission's findings were unfavorable and its order denied the application. The Commission's then report was not accompanied by certificates carrying out its findings, and it reserved jurisdiction to alter its findings in the event that the plan of the State Commission, as finally evolved, should be materially different from that "as here considered to be in the public interest". (R. 89.)

Thereafter the State Commission reopened its proceeding and, after further hearing, rendered a decision making the same findings as this Commission and, in addition, findings to the effect that

public convenience and necessity required the construction of a union passenger station within the plaza area, which, in its opinion, could be done at a cost of $10,000,000 in substantial compliance with a plan prescribed by it. (R. 17, 18.) The State Commission issued its order for the carrying out of its findings, which order, however, was to become effective only after this Commission had issued its certificates or orders covering, not alone the extensions and abandonments of tracks involved, but likewise the construction of the union passenger station. (R. 120.)

The City of Los Angeles and the State Commission thereupon filed petitions with this Commission asking that certificates be issued in accordance with the findings theretofore made and, further, for an order requiring the carriers to construct and operate a union passenger station in compliance with the said plan of the State Commission. (R. 19.) After further hearing the Commission reaffirmed its findings theretofore made and issued certificates in conformity therewith. Likewise it adhered to the conclusions expressed in its earlier report that it was without authority "to require the construction of a union passenger station of the character sought by the complaint." (R. 139.) And it, accordingly, refused to issue an order for the construction thereof.

The case was submitted in the Supreme Court of the District of Columbia upon the petition for

writ of mandamus, the rule to show cause, the answer of the Interstate Commerce Commission and the demurrer to said answer. There were included as exhibits to the petition the complaint before the Interstate Commerce Commission and said Commission's first report, the final decision of the State Commission, the petition asking the Interstate Commerce Commission to issue its certificates and order, and said Commission's final report. On October 18, 1928, said court entered judgment overruling the demurrer and dismissing the petition.

On the appeal, that judgment was reversed by judgment of the Court of Appeals of the District of Columbia. The accompanying opinion held in substance that this Commission was clothed not only with supervisory control over the construction of union passenger stations, growing out of its power to grant or withhold permission for the rearrangement of main line track incidental to the establishment of such station, but that it likewise had the direct and affirmative authority to require the carriers to construct and establish new union passenger stations.

REASONS FOR GRANTING THE PETITION

The reasons relied upon by the petitioner for the issuance of a writ of certiorari and upon which petitioner believes that this petition ought to be granted are as follows:

1. The case involves a question of general importance;

2. The decision of the Court of Appeals of the District of Columbia rests upon an erroneous construction of an applicable decision of this court.

BRIEF IN SUPPORT OF PETITION

OPINIONS

No opinion was rendered by the Supreme Court of the District of Columbia. The opinion of the Court of Appeals has not been published but will be found on page 163 of the record.

JURISDICTION

The order of the Supreme Court of the District of Columbia dismissing the petition for a writ of mandamus was entered October 18, 1928. From this order an appeal was prosecuted to the Court of Appeals of the District of Columbia. (R. 158–161.)

The jurisdiction of this court is invoked under subsection (a) of section 240 of the Judicial Code as amended and reenacted by the Act of February 13, 1925 (c. 285, 43 Stat. 936, 938).

STATEMENT OF THE CASE

The court is respectfully referred to the statement of the case contained in the petition for the writ of certiorari.

THE STATUTES

The relator sets forth in paragraph XVI of its petition the provisions of the Act which it considers clothes the Commission with the authority to

acquire the construction of union passenger stations. They are paragraphs (3) and (4) of section 3, paragraph (21) of section 1, and a part of section 12. These provisions are set forth below together with paragraphs (18)–(20) and (22) of said section 1.

Section 3(3) and (4) read as follows:

> (3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.
>
> (4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in

the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Section 1(18)–(22) of the Act read as follows:

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been

obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general-steam railroad system of transportation.

The portion of section 12 relied upon by the relator reads as follows:

> * * * and the Commission is hereby authorized and required to execute and enforce the provisions of this Act * * *.

ASSIGNMENT OF ERRORS

The Court of Appeals of the District of Columbia erred in holding that the Commission was clothed with authority to require the carriers to construct the union passenger station, and in construing the decision of this court in *R. R. Comm. of Calif.* v. *Southern Pac. Co., supra,* as supporting that holding.

ARGUMENT

The case involves a question of general importance

A more important question in the field of railroad regulation can not be readily conceived than that of whether or not the Federal Commission has authority to require railroads serving a city to abandon existing terminals and substitute therefor a new union passenger station. Such authority if possessed would obtain in respect of all railroad junctions, including the innumerable large cities of the country with their residential, commercial, shopping, and municipal centers fixed and established with relation to existing terminals, their great buildings peculiarly adapted to the particular centers in which they stand, and their complicated local transportation and traffic problems now adjusted

to existing terminals and established centers. All these local interests would be vitally affected by the substitution of a union station for present terminals. An unwise selection of its site from the standpoint of the city might badly disrupt property values and likewise the local transportation systems. It might call for terminal tracks over rights of way not best fitted to the safety of the cities' streets, or for viaducts or tunnels in localities poorly adapted to the convenience and best interests of the city. While the federal and local interests will often be in harmony, as they are in the present case, in other instances they will be in conflict. If the Commission's authority attaches it would seem that it could be exerted only to serve the best interests of interstate commerce and, accordingly, that the Commission could give consideration to the local interests only to the extent that injury to those interests would react injuriously upon interstate commerce.

By reason of its power to grant or withhold permission for the incidental rearrangement of main line track the Commission may now prevent the establishment of union stations, whether by voluntary action of the carriers or under order of a State commission, if it considers that the cost will unduly deplete the revenues of the carriers. But the effect of the exercise of that indirect and restrictive means of control would merely be to preserve the existing status in the cities affected. A direct and mandatory authority to require the

building of the station itself and the abandonment of existing terminals is obviously quite a different thing and could not be exercised without active interference in the internal arrangements of the cities. If it had been intended to clothe the Commission with authority of that character unquestionably the intention would have been expressed in plain terms and would not have been left to be implied from provisions of general regulatory nature.

The Act contains no provisions expressly empowering the Commission to require the establishment of union stations

The Court of Appeals finds the Commission clothed with authority to require the building of union passenger stations from provisions of the Act of general regulatory character and of broad terminology. It mentions paragraphs (3) and (4) of section 405 of the Transportation Act (paragraphs (3) and (4) of section 3 I. C. C. Act as amended). Paragraph (4) empowers the Commission to require an owning carrier to permit the use by other carriers of its terminals and tracks for a reasonable distance outside thereof. This obviously has reference to existing terminals and not to the building of new union passenger stations and incidental abandonment of existing individual stations, and while the court mentions that the carriers now own most of the land necessary for the

proposed station, it relies upon this paragraph only for the Commission's authority to require "an interchange of trackage" and not to show that it has the power to require the substitution of a new union passenger station in lieu of existing terminals. For this latter authority the Court of Appeals relies upon paragraph (3). That paragraph provides as follows:

> All carriers * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, or charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

The Court of Appeals after stating that this paragraph vests the Commission with almost unlimited power in the matter of establishing terminals and union stations goes on to say:

> The term "reasonable, proper and equal facilities" is broad and comprehensive enough to include not only trackage but adequate station facilities. (R. 169.)

The phrase, referred to, is broad and comprehensive. Indeed, we believe that if Congress had intended to empower the Commission to require the

establishment of union stations, a power which could not be exercised without great interference in the internal affairs of the cities, it would not have employed such general language but would have stated its intention in plain and unmistakable terms, which would have included provisions for securing the cooperation and views of local authorities. In support of this conclusion the court's attention is directed to the following:

1. If the broad duty imposed on the carriers by paragraph (3) to afford reasonable and equal interchange facilities had been intended to authorize the Commission to require the building of new union stations with all the incidents of abandonment of existing terminals, acquisition of new land and rights of way in the midst of great cities, why was it necessary in the preceding paragraph (4) to employ specific and elaborate provisions (see page 10, supra) in empowering the Commission to require one carrier to permit the use by other carriers of its terminals, where the affording of reasonable interchange facilities would be promoted thereby?

(2) When Congress decided to clothe the Commission with authority over abandonments and extensions of lines it did not leave that authority to be inferred from general regulatory provisions but made clear its intention in unmistakable language including provisions for notifying and according hearings to the States (section 1 (18) to (21)). This is true, too, in respect of the provisions giving

the Commission authority over the consolidation of railroad properties (section 5 (5)), over the consolidation of telephone properties (section 5 (9)), and to act directly upon intrastate rates to prevent discriminations against interstate commerce (section 13 (3)).

3. No imperative need exists to read into this general regulatory provision a power so extensively affecting local interests. *Lehigh Valley R. Co.* v. *Pub. Utility Comm.*, 278 U. S. 24. The indirect means of control possessed by the Commission through its authority over the relocation of track that would be necessary in establishing union stations enables it to prevent waste of revenue that might impair the carriers' ability to perform their common carrier service. The situation is analogous to that obtaining before the Commission was given direct authority to act on intrastate rates that discriminated against interstate commerce. The Commission had theretofore had an indirect means of control. *Houston & Texas R. Co.* v. *United States*, 234 U. S. 342. But when Congress decided to clothe it with authority to operate directly on intrastate rates it did so in plain and unmistakable language (section 13(3)); *Wisconsin R. R. Comm.* v. *C., B. & Q. R. Co.* 257 U. S. 563, 584.

4. Not only is the requirement to afford reasonable and equal interchange facilities very general and found in association with provisions mostly directed against discrimination, but also it is one directed to the carriers and not the Commis-

sion. Accordingly, the construction given it by the Court of Appeals is, in effect, that whenever reasonable interchange facilities would be promoted by a union station the carriers would be contravening the provisions of the Act unless they voluntarily undertook the project. In order to find Commission authority to enforce the duties laid upon the carriers by the paragraph (whatsoever they may be) resort must be had to another general provision, namely, that contained in section 12 which reads:

> and the Commission is hereby authorized and required to execute and enforce the provisions of this Act.

It seems inconceivable that, in a matter so important as union stations, both the duty of the carriers to establish, and the authority of the Commission to enforce such duty, would have been left by Congress to be inferred from general provisions.

The decision of the Court of Appeals rests upon an erroneous construction of the decision of this Court in R. R. Comm. of Calif. v. *Southern Pacific Co., 264 U. S. 331*

The closing paragraph of the opinion of the Court of Appeals reads as follows (R. 170):

> The procedure adopted by the City of Los Angeles in applying to the Interstate Commerce Commission for an order requiring the carriers to establish the union station in question was approved in the concluding words of the opinion in the Los Angeles Case, where the court said: "We were advised by

> statements at the bar that, after the California Supreme Court handed down its decision in this case, the City of Los Angeles filed a petition with the Interstate Commerce Commission asking for an order to provide, maintain and use a union station; that a hearing followed and that, pending the decision in this court, the matter is held under consideration. For the reasons given, we think the course taken by the City of Los Angeles was the correct one."

We believe that the balance of the concluding paragraph of this court's decision in the *Los Angeles Case* (*R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331) contains its real holding. The whole paragraph reads as follows:

> For the reasons given, we think the course taken by the City of Los Angeles was the correct one. Until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of section 402 of the Transportation Act, the respondent railways can not be required to provide a new interstate union station and to extend their main tracks thereto as ordered by the State Railroad Commission.

The court had theretofore (p. 344) carefully described those paragraphs (18) to (21) and had shown that what was called for was the Commission's certificate of authority for extensions or abandonments of lines, which certificate could only be given, at least as to extensions, upon finding by the Commission that the expense involved would

not impair the carriers' ability to perform its duty to the public. Since the establishment of the union station in this instance would necessitate extensive relocation of main track, the court had held (p. 346) that such certificate of the Commission under paragraphs (18) to (21)

> was a condition precedent to the validity of any action by the carriers or of any order by the State Commission.

This latter is the essential holding of the decision and, as just above shown, it is in effect again repeated in the court's closing words. And, moreover, the court had previously discussed the contention made in the case that the extensions of lines referred to in paragraphs (18) to (21) were only those opening up new territory and were not intended to include such as were merely incidental to the rearranging of terminals. It disagreed with that contention (344–345), stating that it was confirmed in its view by the succeeding paragraph (22) which excepts from Commission authority "the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State," thereby showing the legislative intention to retain the more substantial changes in main tracks within the control of the Federal Commission. Continuing, the decision gives recognition to the fact that there would be instances when the State commission could require union stations without the necessity of this

Commission's authority for incidental changes in track. It reads:

> * * * One might, too, readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial capital outlay should be regarded as an ordinary exercise of the police power of the State for the public convenience and would not trench upon the power and supervision of the Interstate Commerce Commission in securing proper regulation of an interchange of interstate traffic or passengers. Only a lawful order of the Interstate Commerce Commission would raise a question of the power of a state commission in such cases, as the proviso of paragraph 17, section 402 of the Transportation Act shows:
>
> "That nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act."

The immediately succeeding paragraph shows that the kind of "lawful order of the Interstate Commerce Commission" which the court had in mind, was not an affirmative order requiring the building of union stations. It reads:

> But there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of section 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission.

The decision, then, while showing that this Commission's permission for incidental relocation of tracks is a prerequisite to action by the State or the carriers looking to the establishment of union stations if changes in main track and substantial capital outlay are involved, nevertheless recognizes that this Commission's authority even in respect of rearrangement of track may not always be necessary.

This, it seems to us, irrefutably shows that the Commission's authority is not a direct and affirmative authority to require the building of union stations, but is only an indirect and restrictive authority growing out of its power to withhold permission for extensions and abandonments of track, and which may properly be exercised as a "means of control" to prevent the establishment of expensive union stations where tending to impair the ability of the carriers to perform their duties to the public.

Such indirect and restrictive authority, which this court found to be possessed by the Commission, is very clearly a thing apart from a direct and mandatory authority to require the carriers to establish union stations in lieu of their existing terminals. An intent to occupy the whole field in respect of union stations can not be inferred from the fact that Congress has in part occupied the field by giving the Commission such indirect power to prevent their establishment through its authority to permit or forbid the incidental rearrangement of main track. *Savage* v. *Jones,* 225 U. S. 501, 533; *Napier* v. *Atl. Coast Line,* 272 U. S. 605, 611; *Southern Ry. Co.* v. *R. R. Com.,* 236 U. S. 439.

For the foregoing reasons it is respectfully submitted that the petition should be granted.

DANIEL W. KNOWLTON,
For Interstate Commerce Commission.

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